83-275

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1983

NO.

JAMES L. ISAACS,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Petitioner JAMES L. ISAACS prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals

for the Ninth Circuit entered June 20, 1983, affirming his convictions under 21 U.S.C. §841(a)(1), and that on hearing the judgments of convictions be reversed.

QUESTION PRESENTED

Where a search warrant confers authority upon an agent to search for foreign items (rent receipts and counterfeit currency) which might be expected to be found hidden in a ledger, notebook, or similar item, may he or she "briefly peruse" writing contained therein?

OPINIONS BELOW

The amended opinion of the Court of Appeals, which is scheduled for publication but not yet published, dated June 20, 1983, is Appendix "A" to this Petition. The pertinent District Court orders were by minute order and unpublished.

GROUNDS FOR JURISDICTION

The amended opinion of the Court of Appeals was filed on June 20, 1983, and Petitioner's Petition for Rehearing was denied on the same day. Jurisdiction is conferred on this Honorable Court by 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Amendment IV, provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

On April 7, 1982, an indictment was filed in the Northern District of California against JAMES LOUIS ISAACS in six counts. The Counts now pertinent, III and V, charged possession with intent to distribute, respectively, 718 grams of methaqualone and 41.8 grams of cocaine, in violation of 21 U.S.C. §841(a)(1). (Docket, line 7.)

Petitioner filed a motion to suppress six journals seized from his apartment on March 23, 1982. The motion was heard before the Honorable Eugene F. Lynch on May 21, 1982. The affidavit in support of search warrant states that ISAACS paid rent two different months partially with counterfeit one hundred dollar bills. The search warrant names "counterfeit $100 Federal Reserve Notes and rent receipts," nothing else. Petitioner's position was that the journals were not named in the warrant and

not properly within its scope. (Docket, line 13.)

At the hearing, held before the Honorable Eugene F. Lynch on May 21, 1982, the prosecutor explained his position that the agent,in looking through the journals for counterfeit currency and rent receipts, noticed something of evidentiary value and was entitled to seize it. The hearing proceeded with the issue framed in this fashion. (RT 4:10-9:7.)

Special Service Agent Richard L. Adams testified that while in the apartment he noticed narcotics and narcotic-related materials in plain sight, while looking for the items named in the warrant. (RT 9:19-11:10.)

After he found the drugs, he noticed a safe in the same closet. He obtained the combination from ISAACS and looked inside. (RT 11:11-12:10; 13:2-8; 15:21-16:6; 16:12-19.) He did not see any counterfeit or rent

receipts, but he did find six journals, bound together with a rubber band, at an angle in the safe with their backs upward. (RT 13:9-17.)

He looked through the journals. Twice he testified that he was "primarily" looking for counterfeit currency (RT 13:18-24; 17:1-18:4) and at another point that he made no attempt "per se" to read the ledgers as he was going through them. (RT 18:10-24.) In going through the journals he noticed information "that could possibly relate to maybe possession with intent to distribute narcotis," such as names of individuals ("B. Pipe" for example), an amount (such as one ounce), and dollar amounts. (RT 13:25-15:20.)

As he was looking through the journals, if he came to what "could be" a narcotics transaction, he stopped and looked at those. When asked how he knew they were narcotics transactions, he said its relatively easy

to see, when you turn a page and see fourteen grams and a dollar amount, that "could possibly relate" to narcotics transactions. (RT 18:25-19:10.)

Exhibit 1-A at the hearing (Exhibit 9 at the first trial and Exhibit 6 at the second trial) is a rather thin journal. At some point he stopped and took a look at the words on the pages. On the third or fourth page, the first observation he made was the "14 gr" and the "70/", indicating to him fourteen grams and $70. (RT 20:14-22:21.)

When asked to demonstrate how he did this, he said he leafed through the pages and when he came to the pages that have writing he stopped and looked at the writing. He examined the writing and notice the "14 gr". (RT 23:24-25:8.) The Court interprets the testimony that when the agent came suddenly upon writing that said fourteen grams he stopped to look. (RT 26:2-6.)

The Court himself thumbed through Exhibit 1-A. He found that mechanically, the way the thumb works, you begin to slow down towards the end. What jumped out at him was two ounces--where he happened to be when he slowed down. (RT 27:6-29:12.) The difference, we submit, is obvious. The agent stopped to read where the writing began and the Court did not.

The agent did not notice anything incriminating in the other five journals on the scene. However, since they were all bound together, he took them with him to look at more thoroughly back at the office. (RT 17:1-18:4; 23:16-23.)

The Court denied the motion as to Exhibit 1-A and granted it as to the other five journals. Please see the transcript of the findings which is Appendix "B" to this Petition.

The case proceeded to trial before Judge Lynch. On June 4, 1982, a mistrial

was declared, due to jury deadlock.

The case was reassigned to the Honorable Lloyd H. Burke on July 12, 1982. (Docket, line 35.) Eventually, both suppressed and unsuppressed journals were admitted.

After conviction by jury, Petitioner was sentenced to six years imprisonment and five years special parole concurrent and consecutive $2,500 fines. (Docket, line 50; please see the Judgment which is Appendix "C" to this Petition.)

A timely appeal was perfected to the Court of Appeals. At page 2114 of the opinion the Court states that the Trial Court " . . . found that the agents perused the ledger is no more thorough a manner than necessary to determine whether it contained the items which were the object of the search warrant." Apparently finding this statement difficult conscientiously to reconcile with the proceedings in the

Trial Court, the Court goes on to the proposition this Petition addresses:

> " . . . [W]hen conditions justify an agent in examining a ledger, notebook, or similar item, he or she may briefly peruse writing contained therein . . . the justification . . . may arise from the authority conferred by a warrant to search for certain items which might reasonably be expected to be found within such a book . . .." (Opinion, p. 2116.)

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The Court of Appeals holds that agents can "briefly peruse" writings encountered in a warrant-authorized search for something else. The term "briefly peruse" is peculiar, since "peruse" generally means "to read carefully or critically for

revision or study of." (Webster's New International Dictionary, 2d ed. (1936).) From the whole record and opinion, however, it is clear that "briefly peruse" means "read". Thus, the terminology is not troublesome as the doctrine it encapsulates: The most private of items is beyond Fourth Amendment protection.

In Texas v. Brown, ____ U.S. ____, 103 S.Ct. 1535, 75 L.Ed.2d 502 (April 19, 1983), the Court advanced Fourth Amendment jurisprudence by separately focusing on the interests implicated by searched versus seizures. The plurality in Brown took the approach that where an agent legitimately has access to an object, thereafter only possessory and no privacy interests are involved. The facts of the instant case show that this approach is not always correct, i.e., when the step is taken from access to a writing to reading it. As the Court observed in United States v.

Diachiarinte, 445 F.2d 126, 130 n.4 (7th Cir., 1971), a much greater invasion of privacy results from an agent's reading personal papers than from rummaging through personal property. The approach of the concurrence in the judgment of Justice Stevens, at 103 S.Ct. 1545, 1546, better accommodates this problem:

> "An object may be considered to be 'in plain view' if it can be seized without compromising any interest in privacy."

Indeed, something akin to this may have been behind the original formulation of the "immediately apparent" requirement in the plurality opinion in Coolidge v. New Hampshire, 403 U.S. 443, 446 (1971):

> "Of course, the extension of the original justification is legitimate only where it is imme-

diately apparent to the police that they have evidence before them; the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges."

It is respectfully submitted that the question raised by this Petition must be resolved to make the plain view doctrine cohesive and sensible, and to protect the Fourth Amendment rights of the citizenry.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Writ of Certiorari should issue.

Respectfully submitted,

ROMMEL BONDOC
Attorney for Petitioner
JAMES L. ISAACS

APPENDIX A

AMENDED OPINION

UNITED STATES V. ISSACS

No. 82-1534

United States Court of Appeals,
Ninth Circuit.
Argued and Submitted March 15, 1983.

Decided May 9, 1983.

As Amended On Denial of Rehearing

June 20, 1983.

Defendant was convicted in the United States District Court for the Northern District of California, Lloyd H. Burke, J., of possession of methaqualone with intent to distribute and he appealed. The Court of Appeals, Farris, Circuit Judge, held that: (1) journal containing notations that appeared to relate to drug transactions was properly seized (2) defendant had standing to challenge seizure; (3) other journals were properly suppressed; (4) suppressed journals were properly used

for impeachment purposes; and (5) dismissal of charges of using a gun to commit crime of possession did not preclude introduction of the guns as evidence of drug trafficking.

Affirmed.

Appeal from the United States District Court for the Northern District of California.

Before HUG and FARRIS, Circuit Judges, and GADBOIS,* District Judge.

FARRIS, Circuit Judge:

A jury convicted James Louis Issacs on two counts of possession with intent to distribute methaqualone and cocaine in violation of 21 U.S.C. §841(a)(1). He now challenges: 1) the denial in part of his pretrial motion to suppress certain journals seized during a search of his apartment pursuant to a warrant; 2) the trial court's

* The Honorable Richard A. Gadbois, United States District Judge for the Central District of California, sitting by designation.

ruling which permitted the government to impeach his testimony with illegally seized journals; and 3) the trial court's denial of his motion to suppress a gun and related items seized during the same search.

FACTS

Agents of the Secret Service obtained a warrant to search Issacs's residence for rent receipts and counterfeit Federal Reserve notes. While searching the apartment in Issacs's presence and pursuant to the warrant, the agents uncovered a gun, shoulder holster, and ammunition. The agents also discovered drug paraphernalia and considerable quantities of methaqualone and cocaine on a shelf in the bedroom closet. There is no dispute that the gun, drugs, and related items were in plain view.

In the same closet the agents noticed a safe, the combination to which Issacs gave them. Upon opening the safe, they found six journals bound together with a rubber band. An agent testified that he flipped through the journals in order to ensure that they contained no receipts or counterfeit notes. While leafing through one journal, the agent came across notations which appeared to record drug transactions. Although he noticed nothing similar in the remaining journals at the time, he seized all six.

On April 7, 1982, a grand jury indicted Issacs on six counts. The first and second counts charged him with passing counterfeit notes in violation of 18 U.S.C. §472. The third and fifth counts charged him with possession with intent to distribute methaqualone and cocaine in violation of 21 U.S.C. §841(a)(1). The fourth and sixth counts charged him with

use of a gun to commit the crimes charged in the third and fifth counts in violation of 18 U.S.C. §924(c)(1).

After severance of the first two counts, Issacs moved to suppress the journals. The court denied the motion as to the first journal and granted it as to those remaining, reasoning that the agents were not entitled to seize objects when initial inspection revealed no incriminating features. During the course of the first trial, which ended in mistrial, the judge granted a motion for acquittal on the gun counts. At the second trial, a different judge admitted the suppressed journals for purposes of impeachment. The court also admitted evidence of possession of firearms. The jury at the second trial found Issacs guilty of both counts of possession with intent to distribute. On the government's motion the court subsequently dismissed the counterfeit note counts.

A. SEIZURE OF THE JOURNALS

Issacs argues that the evidence in the unsuppressed journal was beyond plain view because the agent needed to read its contents to uncover the incriminating notations. The government challenges Issacs' "standing" to object to the search, pointing to his disclaimer of ownership or possession of the journals at trial, and contends that in any case the journal was in plain view.

[1] In Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), the Supreme Court "abandoned a separate inquiry into a defendant's 'standing' to contest an allegedly illegal search in favor of an inquiry that focused directly on the substance of the defendant's claim that he or she possessed a 'legitimate expectation of privacy' in the area searched." Rawlings v. Kentucky, 448 U.S. 98, 104, 100 S.Ct. 2556, 2561, 65 L.Ed.2d 633 (1980) (citing Katz v. United States,

389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)); accord United States v. Salvucci, 448 U.S. 83, 87 n. 4, 100 S.Ct. 2547, 2551 n. 4, 65 L.Ed.2d 619 (1980). The conversion of standing from a preliminary to a substantive question makes no practical difference, however. Rakas, 439 U.S. at 139, 99 S.Ct. at 428. Issacs must still demonstrate (1) that the agents found the journal in a place in which Issacs had a legitimate expectation of privacy and (2) that the search exceeded fourth amendment constraints. Rawlings, 448 U.S. at 104, 100 S.Ct. at 2561.

1. Legitimate expectation of privacy.

At first glance the government's contention that Issacs had no legitimate expectation of privacy in a locked safe hidden in a closet in his own apartment appears ludicrous. The government argues,

however, that Issacs's disclaimer at trial of ownership or awareness of the journals negates any expectation of privacy. The government reasons that "it is logically impossible to have an expectation of privacy in items one does not know exist." Appellee's Brief at 8.

Of course, it is also "logically impossible" to deny knowledge or possession for purposes of the suppression motion but to take the opposite position for purposes of proving guilt at trial. Until recently, the rule of automatic standing established in Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960), which was expressly intended to deny the government "the advantage of contradictory positions as a basis for conviction" in possession cases, would have precluded such inconsistency. Id. at 263, 80 S.Ct. at 732. However, the Court abandoned that rule in Salvucci.[1/] The Court there recog-

nized that "a prosecutor may simultaneously maintain that a defendant criminally possessed the seized good, but was not subject to a Fourth Amendment deprivation, without legal contradiction." 448 U.S. at 90, 100 S.Ct. at 2552.

[2] Nevertheless, the government's argument fails here. Its position assumes that Salvucci permits the prosecution to charge possession but dispute expectation of privacy regardless of the underlying facts. The rationale of Salvucci does not support so unbounded a reading. The Court there refused any longer to recognize a necessary connection between possession and expectation of privacy which "afford[ed] a windfall to defendants whose Fourth Amendment rights [had] not been violated." Id. at 95, 100 S.Ct. at 2554 (emphasis in original). The Court simply rejected conferral of automatic standing; it did

not condone prosecutorial self-contradiction.[2/] Salvucci does not permit the government to argue possession but deny expectation of privacy where the circumstances of the case make such positions necessarily inconsistent.

[3] The government may properly contend that a defendant owned drugs which, moments before the challenged search, he had placed in his girlfriend's purse, in which he had no legitimate expectation of privacy. See Rawlings, 448 U.S. at 104-06, 100 S.Ct. at 2561-62. It may argue that checks found in the apartment of another in which a defendant had no legitimate expectation of privacy belonged to the defendant. See Salvucci, 448 U.S. at 85, 95, 100 S.Ct. at 2549, 2554. It may properly seek to introduce evidence seized from a room with which a defendant had no connection beyond mere presence and thus

no legitimate expectation of privacy. See United States v. Irizarry, 673 F.2d 554, 556 (1st Cir. 1982). And it may argue that a defendant once possessed an item but, by abandoning it, subsequently renounced any expectation of privacy in it. See United States v. Veatch, 674 F.2d 1217, 1220-22 (9th Cir. 1981); United States v. Anderson, 663 F.2d 934, 937-39 (9th Cir. 1981).

Here, however, the government wants it both ways: It seeks to rely on Issacs's disavowal of ownership to defeat his right to contest the lawfulness of the search at the same time it introduces the journal as evidence of his guilt. Yet the government cannot and does not dispute that Issacs had a legitimate expectation of privacy in the safe itslef, and there can be no question of abandonment of items found in the putative abandoner's personal safe. Issacs's denial of ownership should

not defeat his legitimate expectation of privacy in the space invaded and thus his right to contest the lawfulness of the search when the government at trial calls upon the jury to reject that denial. See United States v. Ross, 655 F.2d 1159, 1165 (D.C.Cir. 1981) (en banc) (rejecting "Government's position that [defendant's] trial tactic, denying knowledge of the [contraband-filled] bag, strips him of Fourth Amendment protection"), rev'd on other grounds, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982).

Moreover, the distinction the government seeks to draw between an expectation of privacy in the space invaded and the items seized is untenable. The cases upon which it relies all involve seizures from places arguably outside the defendant's control. See, e.g., Salvucci, 448 U.S. at 85-86, 95, 100 S.Ct. at 2549-50, 2554-55. Rawlings, 448 U.S. at 100-06, 100

S.Ct. at 2559-62. The government's concession that Issacs had "a legitimate expectation of privacy in the invaded place," Rakas, 439 U.S. at 143, 99 S.Ct. at 430, precludes its contention that he had none in the items found there.

[4] Issacs had a legitimate expectation of privacy in the safe in which the journals were found and thus may contest the lawfulness of their seizure.

2. Plain view.

At the time of Issacs's suppression hearing, the plurality opinion in Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), governed the reach of the plain view exception. There Justice Stewart stated that officers inadvertently coming upon objects in plain view during the course of a legal search may seize them even though they are not specifically mentioned in the warrant if it is

"immediately apparent to the police that they have evidence before them." Id. 466, 91 S.Ct. at 2038. Issacs argues that this plain view exception to the warrant requirement cannot support the seizure of the journal here because the officer needed to read its contents in order to appreciate their incriminatory nature.

[5] We disagree. Issacs cannot and does not dispute that the agents could rightfully examine the ledger in order to ascertain whether notes or receipts were hidden within it. See United States v. Wright, 667 F.2d 793, 799 (9th Cir. 1982). The trial court found that while leafing through the ledger the officers noticed notations that appeared to concern drug transctions. It further found that the agents had perused the ledger in no more thorough a manner than necessary to determine whether it contained the items which were the object of the search warrant.

These findings are not clearly erroneous, see United States v. Lee, 699 F.2d 466, 468 (9th Cir. 1982); United States v. Wysong, 528 F.2d 345, 349 (9th Cir. 1976), and support the district judge's conclusion that the "inadvertent" discovery of the notations made it clear to the agents that they had evidence before them. See Coolidge, 403 U.S. at 469, 466, 91 S.Ct. at 2040, 2038.

The Supreme Court's recent decision in Texas v. Brown, ____ U.S. ____, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983), does not affect this result. There the Court reconsidered the Coolidge plurality's "immediately apparent" language and substituted a probable cause standard. See id. at ____, 103 S.Ct. at 1541-43 (Rehnquist, J.) (plurality opinion); id. at ____, 103 S.Ct. at 1545 (Stevens, J., concurring in the judgment); see also id. at ____, 103 S.Ct. at 1544 (Powell,

J., concurring in the judgment). Justice Rehnquist's plurality opinion also questioned the element of inadvertence. See id. at ____, 103 S.Ct. at 1543; see also id. at ____, 103 S.Ct. at 1544 (White, J., concurring). Since the district judge's factual findings support his conclusions that the discovery was inadvertent and that the incriminatory nature of the notations was immediately apparent, they would necessarily support conclusions founded on any lower thresholds for these two requirements.

Issacs seeks support in United States v. Wright, which involved superficially similar facts. There we held that the trial court had erred by failing to suppress a black ledger which contained notations concerning drug transactions. Agents of the Federal Bureau of Alcohol, Tobacco and Firearms had executed a federal search warrant which authorized the seizure of a

California driver's license. During the course of the search, Agent Kelly came upon a small black ledger. He searched through the ledge without finding the license which was the subject of the search. Without initially having noticed anything particularly incriminating about the ledger, he brought it to Agent Frantzman of the Drug Enforcement Agency in order to allow him to examine it more closely. Frantzman determined that the ledger recorded drug transactions.

The critical difference between the search invalidated in Wright and the search that we consider here is that in Wright the initial, justified perusal of the ledger in search of the driver's license revealed nothing incriminating. We carefully observed:

> Kelly's testimony did not include any facts that would give rise to a reasonable suspicion that the

> ledger was evidence of a crime. Consequently, Kelly exceeded his authority to search for the license when he took the ledger to Frantzman so that he could inspect its contents. Similarly, Frantzman had no right to read the ledger's entries. The incriminating nature of the ledger was not "immediately apparent" to Frantzman but was revealed only after he carefully examined its contents.

667 F.2d at 799. Since Kelly, who conducted the initial, justifiable search, had no concrete reason to suspect that the ledger contained incriminating evidence, the search conducted by Frantzman passed beyond the bounds of conduct authorized by the plain view doctrine and into the realm of exploratory rummaging against which the warrant requirement protects.[3/] Here, by contrast, the trial court specifically

found that the agents' observation of the drug-related notations was inadvertent and that their incrimating nature was manifest.

United States v. Hillyard, 677 F.2d 1336 (9th Cir. 1982); Wysong, 528 F.2d at 349; and United States v. Damitz, 495 F.2d 50 (9th Cir. 1974), support our conclusion. In Hillyard we validated the warrantless seizure of a log book and notebook found in plain view in the cab of a truck nown to be stolen. The books' location gave rise to a reasonable suspicion that they contained evidence. Therefore, it was lawful for the agents to peruse briefly their contents. This examination revealed entries obviously relevant to the criminal scheme under imvestigation. In Wysong we held lawful the seizure of a ledger book found in a suitcase pursuant to a warrant authorizing a search for cocaine and premarked currency. Since agents had previously discovered in defendant's motel room a page ripped from

a ledger book and covered with figures relating to drug transactions, the agents executing the search had immediate cause to suspect that the ledger, in plain view upon opening the suitcase, was connected with illegal activity. In Damitz we upheld the warrantless seizure of a notebook containing evidence of drug sales which agents found in plain view next to drug paraphernalia during a valid search for drugs and drug paraphernalia. The location of the notebook gave concrete cause for suspicion.

These cases make clear that when conditions justify an agent in examining a ledger, notebook, journal, or similar item, he or she may briefly peruse writing contained therein. See also United States v. Chesher, 678 F.2d 1353, 1356-57 n.2 (9th Cir. 1982); United States v. Ochs, 595 F.2d 1247, 1256-59 & n. 8 (2d Cir.),

cert. denied, 444 U.S. 955, 100 S.Ct. 435, 62 L.Ed.2d 328 (1979). The justification may arise from "a 'reasonable suspicion' to believe that the discovered item is evidence," Wright, 667 F.2d at 798, as in Hillyard, Wysong, and Damitz; or it may arise from the authority conferred by a warrant to search for certain items which might reasonably be expected to be found within such a book, as here. In either case, the plain view doctrine would permit brief perusal of the book's contents and, consequently, its seizure if such perusal gives the examining agent probable cause to believe that the book constitutes evidence. See Hillyard, 677 F.2d at 1342.

We do not mean to suggest that agents entitled to examine a book or similar item may minutely scrutinize its contents, especially when personal,

nonbusiness papers are involved. See Crouch v. United States, 545 U.S. 952, 955-56, 102 S.Ct. 491, 492-93, 70 L.Ed.2d 259 (1981) (White, J., dissenting from denial of certiorari). But this case does not require us to explore the limits to brief perusal. The trial court's factual findings establish that no more than a glance was necessary to ascertain the incriminating nature of the notations.

[6] The trial court properly admitted the journal in which agents observed the incrimating notations. However, since the preliminary examination uncovered nothing incriminating about the remaining journals, it follows that the agents had no right to seize them in order that they might more closely examine them later. The trial court correctly suppressed them.

B. USE OF THE SUPPRESSED JOURNALS TO IMPEACH ISSACS

Issacs argues that the trial court erred by allowing the prosecution to use the illegally seized journals to impeach his testimony. He relies on United States v. Havens, 446 U.S. 620, 100 S.Ct. 1912, 64 L.Ed.2d 559 (1980), in which the Court held that

> a defendant's statements made in response to proper cross-examination reasonably suggested by the defendant's direct examination are subject to otherwise proper impeachment by the government, albeit by evidence that has been illegally obtained and that is inadmissible in the government's direct case, or otherwise, as substantive evidence of guilt.

Id. at 627-28, 100 S.Ct. at 1916-17; see United States v. Miller, 676 F.2d 359, 364 (9th Cir. 1982), cert. denied, ____ U.S. ____, 103 S.Ct. 126, 74 L.Ed.2d 109 (1982). On direct examination in the second trial, Issacs denied possession of the drugs found in his apartment and authorship of the notations in the unsuppressed journal; denied having seen any of the legally seized evidence, including the unsuppressed journal, before trial; and denied ever selling any drugs. The government sought to introduce the suppressed journals in order to impeach these statements.

[7, 8] To the extent that the evidence contradicted statements made on direct, it was admissible, though for impeachment purposes only. Havens, 446 U.S. at 624, 100 S.Ct. at 1915; Walder v. United States, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (1954). However, the prosecutor went further, eliciting on cross-

examination denials by Issacs that he knew persons of the names mentioned in the unsuppressed journal, then seeking to impeach those statements by introducing the suppressed journals which contained those names. Under Havens the court should have allowed this impeachment only if the line of questions eliciting the denials were "proper cross-examination reasonably suggested by the defendant's direct examination." 446 U.S. at 627, 100 S.Ct. at 1916. Given the sweeping range of Issacs's denials on direct, the court could properly have concluded that the Havens test had been met.

C. DOUBLE JEOPARDY

[9, 10] Issacs contends that the government subjected him to double jeopardy by introducing firearms found in his residence as evidence of drug trafficking despite his acquittal on two counts of using

a gun to commit the crimes of possession with intent to distribute. The argument has no merit. The trial judge has discretion to admit evidence of firearms in drug trafficking cases, United States v. Mirovan, 577 F.2d 489, 494-95 (9th Cir.), cert. denied sub nom., 439 U.S. 896, 99 S.Ct. 258, 58 L.Ed.2d 243 (1978); United States v. Kearney, 560 F.2d 1358, 1369 (9th Cir.) cert. denied, 434 U.S. 971, 98 S.Ct. 522, 54 L.Ed.2d 460 (1977), and the dismissal of the gun counts did not preclude admission of evidence of the guns if relevant for another purpose, United States v. Hobson, 519 F.2d 765, 776 (9th Cir.), cert. denied, 423 U.S. 931, 96 S.Ct. 283, 46 L.Ed.2d 261 (1975).

Affirmed.

Footnotes

1. The Salvucci court found that intervening legal developments had eroded the twin grounds of the Jones automatic standing rule. The holding in Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968), that "testimony given by a defendant in support of a motion to suppress cannot be admitted as evidence of his guilt at trial" eliminated "the risk that self-incrimination would attach to the assertion of Fourth Amendment rights." 448 U.S. at 88, 100 S.Ct. at 2551, Likewise, subsequent recognition that "a prosecutor may, with legal consistency and legitimacy, assert that a defendant charged with possession of a seized item did not have a privacy interest violated in the course of the search and seizure" obviated the need "to prevent the 'vice of prosecutorial self-contradiction.'" Id. at 88-89, 100 S.Ct. at 2551

(quoting Brown v. United States, 411 U.S. 223, 229, 93 S.Ct. 1565, 1569, 36 L.Ed.2d 208 (1973)).

2. However, it did suggest that the desire to foreclose prosecutorial self-contradiction was a peripheral ground of the Jones decision. 448 U.S. at 90, 100 S.Ct. at 2552. The language of Jones establishes otherwise. See 362 U.S. at 263-64, 80 S.Ct. at 732, see also United States v. Agapito, 620 F.2d 324, 334 (2d Cir.), cert. denied, 449 U.S. 834, 101 S.Ct. 107, 66 L.Ed.2d 40 (1980) (pre-Salvucci).

3. For the same reason, neither United States v. Scios, 590 F.2d 956 (D.C. Cir. 1978) (en banc), in which FBI agents opened and read file folders, nor United States v. Dichiarinte, 445 F.2d 126 (7th Cir. 1971), in which agents read through personal papers to search for hints of criminal activity, provides Issacs support.

In both cases the court invalidated the warrantless seizure because no concrete grounds for suspicion prompted the exploratory foray into private papers which eventually produced incriminating evidence.

QUESTION PRESENTED

Where a search warrant confers authority upon an agent to search for foreign items (rent receipts and counterfeit currency) which might be expected to be found hidden in a ledger, notebook, or similar item, may he or she "briefly peruse" writing contained therein?

APPENDIX B

EXCERPTS FROM REPORTER'S TRANSCRIPT
OF PROCEEDINGS, MAY 21, 1982

THE COURT: Submitted:

MR. WOHLSTADTER: (HEREINAFTER "MR. W")

I have . . .

MR. LASSART: (HEREINAFTER "MR. L")

We would submit the evidence at this time, Your Honor.

THE COURT: Okay.

MR. W: Your Honor, I--I think that--that what the officer actually did was to search these books and to read the pages before finding any evidence of a criminal nature. He said he stopped at these particular pages and read the writing.

Now, he was--when he was reading the writing, he was conduc ing a search of those books.

THE COURT: First of all, he only said he looked at one book there, so --in any event, what he said was that he was going through this one book, 1-A, quickly for rent receipts, or counterfeit dollar bills, and then he suddenly came upon some writing that said 14 grams. That's when he stopped to look.

MR. W: Your Honor, it is kind of a coincidence that the one book is the only book that has any writing of that kind, I believe, and--

THE COURT: I don't know. That I don't know.

MR. W: I believe that what the officer did was to conduct an illegal search of personal books of my client, Your Honor. Leafing through the books, as a person would do, in the normal course of events, would not disclose the--without stopping to read these books. When the officer read these books, he was going beyond the scope of the search warrant, because the search warrant was only for the money and the rent receipts.

THE COURT: Normally I'd agree with you, except that in this case rent receipts and money happen to be something that oftentimes are put in books by people--I don't know about rent receipts, but particularly money oftentimes is hidden in books.

MR. W: I understand that, Your Honor, but that could be seen by glancing through the pages without having to stop to read the contents of those pages, and that--

THE COURT: I understand your point. Does only one book have any items in it at all?

MR. W: No, the others have personal writings. I believe.

MR. L: Yes, Your Honor, the others do have writings, and I--I'd have to look at them--

THE COURT: The only proper one at all is 1-A. The rest he didn't read on the premises, so I don't see how he could have--I mean nothing jumped out of them on the premises of any criminality, so I don't think he has a right to take them back or seize them.

MR. W: Your Honor, nothing jumped out in this book either, as the officer testified.

THE COURT: --four grams, was it? I forget whether it was four or one.

MR. W: Four or fourteen grams. But I believe he said that he stopped at that page to read it.

THE COURT: But I mean 14 grams, after having found narcotics on the premises already, is not--I mean if he was a doctor, it may have--14 grams has a very definitive--that's something that strikes a police officer right between the eyes, after having found particularly drugs on the premises already.

MR. W: Yes, Your Honor, if he reads it. If he stops to read it, which is what this officer did at this page. I show you the page and ask the Court to take a look at it. Nothing jumps out off this page without close scrutiny.

THE COURT: Let me go through it the same way he did. Maybe I can make a factual finding here.

(PAUSE IN PROCEEDINGS.)

THE COURT: Well, I mean--I understand-- I understand the arguments.

MR. W: If you're looking for--in other words, being honest, you're looking for something inside the pages, there's nothing inside the pages, he stops and he read the book, and only after doing that, in the nature of an exploratory search, did he find this incriminating evidence.

THE COURT: Submitted?

MR. W: Yes, Your Honor.

THE COURT: Okay. Submitted?

MR. L: Yes, Your Honor.

THE COURT: Yeah, I think that one--the others--all books but 1-A should certainly be suppressed, but 1-A, I mean, seems to me that 1-A should not be suppressed, that it properly falls within Coolidge versus New Hampshire as--it's a piece of evidence inadvertently come across that incriminates the accused, and normally there'd be no right to go through books, but, my goodness, here we have a search warrant for counterfeit money, and rent receipts, very type of small things susceptible to being hidden in books.

But I might say factually, even when I did it, it's not possible just mechanically to flip through a book the same pace all the way through; towards the end, you begin to slow down, just because of the mechanical process of the way your thumb works, and what jumped out at me physically from that book was not 14 grams, but two ounces. I mean that's the page that I happened to hit when I slowed down, and it's pretty bold writing, and under the circumstances of what they were searching for, seeing something inadvertent that they come upon--when he had a right to be where he was in the first place, which he clearly had, and it's--to me it's totally reasonable in light of what he was looking for, and therefore, I would deny the motion to suppress as to 1-A, and grant it as to the other four books.

(Transcript, p. 25, ln. 15 - p. 29, ln. 12.)

APPENDIX C

JUDGMENT AND PROBATION/COMMITMENT ORDER

Six (6) years as to Count 3. $2,500 fine.
Six (6) years as to Count 5. $2,500 fine.
To run concurrent to Count 3.

Total of Six (6) years as to Count 3 and 5.
Total fine of $5,000.
Special Parole Term of 5 years to commence upon release from custody.
Bail on appeal fixed at $10,000.

As further ordered: Counts One and Two (18 U.S.C. §472) were dismissed.

signed LLOYD H. BURKE

8/25/82